IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-975

OLIVER PAUL SUMMERS

Petitioner,

VS

THE STATE OF ALABAMA

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The conviction of Petitioner and his sentence of fifteen years imprisonment in the penitentiary of Alabama for the crime of robbery was affirmed by the Alabama Court of Criminal Appeals in *Summers v. State*, 348 So. 2d 1126 (Ala. Crim. App. 1977).

A Petition for Writ of Certiorari to review the decision of the Court of Criminal Appeals was denied by the Supreme Court of Alabama without opinion, see *Ex Parte Summers*, 348 So. 2d 1136 (Ala. 1977).

JURISDICTION

Petitioner has applied for a Writ of Certiorari in this Court pursuant to 28 U.S.C. §1257(3). He asserts as grounds for his petition an allegation of a denial of due process because of certain statements made by the prosecuting attorney at his trial during final summation and because he was denied a continuance on the day of trial. His petition, however, as will be shown below, is untimely.

Petitioner's conviction and sentence of imprisonment was affirmed by the Alabama Court of Criminal Appeals on May 24, 1977 (A. 2). His application for rehearing in that Court was denied on June 28, 1977 (A. 2).

The Supreme Court of Alabama on August 26, 1977 denied Petitioner's request for a writ of certiorari from that Court to review the decision of the Court of Criminal Appeals (A. 3). Also on August 26, 1977, following the denial of certiorari by the Alabama Supreme Court, judgment was entered by the Alabama Court of Criminal Appeals (A. 3).

On September 7, 1977 Petitioner was granted, upon his request, a ninety-day stay of judgment dating from August 26, 1977 to permit him to file a Petition for Writ of Certiorari in the United States Supreme Court (A. 3). The certificate of judgment was likewise recalled by the Court of Criminal Appeals from the Circuit Court of Marshall County, Alabama on that date (A. 3).

On December 29, 1977, Petitioner presented to this Court his Petition for Writ of Certiorari. His petition is not timely. It was presented thirty-five days past the time allowed by Rule 22, Rules of the Supreme Court of the United States. His petition should have been filed on or before November 24, 1977 — ninety days from the entry of judgment by the Court of Criminal Appeals on August 26, 1977 — to fall within the time limit set by Rule 22. No reason for the delay was given in Petitioner's petition.

SUPREME COURT RULE AND STATUTES INVOLVED

Rule 22. Review on Ceritorari—Time Petitioning

1. A Petition for Writ of Certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the Clerk within ninety days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for writ of certiorari in such cases for a period not exceeding sixty days.

Section 12-21-260, *Code of Alabama* 1975
(Set out in Appendix)

Section 12-21-262, *Code of Alabama* 1975
(Set out in Appendix)

QUESTIONS PRESENTED

I.

Should this Court accept a Petition for Writ of Certiorari to review the judgment of a state court when it is presented to this Court 125 days after entry of judgment by the State

Court of last resort and no reason for the delay is given?

II.

Is it an abuse of discretion amounting to a denial of due process for a trial court to deny a request for a continuance in a state criminal proceeding where the defendant purports to wish to secure testimony by interrogatories of an indicted co-defendant but where there was no showing by the defendant that the co-defendant would even answer the interrogatories or that any material or favorable testimony would be obtained?

III.

Is reference to a defendant by a prosecuting attorney in closing argument in a state court criminal proceeding as a "safe specialist" proper argument when such a description of the defendant is warranted by the evidence?

IV.

Is reference by the prosecuting attorney in closing argument to a threat made by the defendant to a State's witness prior to the trial, when such threat is in evidence and when such reference is provoked by comments made by Petitioner's counsel during summation, proper argument?

STATEMENT OF THE CASE

Petitioner was indicted by the Marshall County, Alabama Grand Jury on September 17, 1976 for the crime of robbery (R. 183-84). On October 13, 1976 Petitioner was arraigned on the indictment and entered a plea of not guilty (R. 2-4).

Alabama law, through Section 12-21-260, *et seq.*, *Code of Alabama* 1975, provides a procedure whereby a defendant in a criminal case may, through the use of written interrogatories, secure trial testimony of witnesses who are physically unable to attend trial, reside more than 100 miles from the place of trial or are out of state. Section 12-21-262, *Code of Alabama* 1975, provides, however, that the procedure may not be utilized if the witness is within the jurisdiction of the court and able to attend court.

Pursuant to Section 12-21-260, Petitioner, on October 29, 1976, propounded interrogatories to two persons. The persons to whom the interrogatories were propounded were two indicted co-defendants, Russell Zinkhan and Donald Nissen (R. 197, 200). Nissen, who pleaded guilty and was sentenced to fifteen years imprisonment for his role in the crime, answered the interrogatories propounded by Petitioner (R. 204) and testified for the State as a witness at Petitioner's trial (R. 38-86, 119-125). The other co-defendant, Zinkhan, was present in the Marshall County Jail on November 11, 1976, the day of Petitioner's trial and was thus available to be called by Petitioner as a witness (R. 8). His presence and availability mooted, under Section 12-21-262, *Code of Alabama* 1975, any use of the testimony by written interrogatories procedure set out in Section 12-21-260.

One day prior to Petitioner's trial, on November 10, 1976, Petitioner propounded a third set of interrogatories to Jimmy Thomas, a third indicted co-defendant (R. 207). Thomas was, at the time, incarcerated in the State of Florida. The next day, on November 11, 1976, the day of trial, Petitioner moved for a continuance on the grounds that his interrogatories had not been answered (R. 210).

A hearing was held on the day of trial on Petitioner's

motion for continuance (R. 7-12). At the hearing on the motion for continuance, the trial judge pointed out to Petitioner that Zinkhan was present in the Marshall County Jail on that date and was thus available to Petitioner as a witness (R. 8). Petitioner's counsel stated that he would issue a subpoena for Zinkhan and talk to him (R. 8-9). Zinkhan, however, did not appear as a witness for Petitioner at the trial.

In regard to the interrogatories propounded the day before to the third co-defendant, Jimmy Thomas, Petitioner made no showing whatsoever at the hearing that Thomas would waive his privilege against self-incrimination and answer the interrogatories. The interrogatories asked substantive questions about Thomas' role in the crime charged (R. 207). Petitioner further made no showing whatsoever of what specific testimony would be elicited should the interrogatories be answered.

The trial judge denied the motion for continuance. Petitioner then proceeded to trial under the indictment in the Marshall County Circuit Court on that day, November 11, 1976 (R. 14). On November 12, 1976 Petitioner was found guilty by a jury and his punishment fixed by the jury at fifteen years imprisonment in the state penitentiary (R. 175). On the same day judgment was duly entered by the trial court and Petitioner was sentenced to fifteen years imprisonment by the trial judge (R. 226).

Petitioner has been at all stages in the proceedings, both at trial and on appeal, represented by retained counsel.

The evidence presented at the trial is set out in the opinion of the Alabama Court of Criminal Appeals at 348 So. 2d 1126-31. That portion of the evidence pertinent to

the issues raised in this petition is synopsized below.

The evidence at the trial showed Petitioner to be a member of an interstate group specializing in the gunpoint robbery of persons in their homes. Petitioner's role in the robbery ring was to "set up" the robberies, to provide the intelligence information concerning the residences to be robbed and their occupants and participate in the planning of the robberies. Petitioner also provided vehicles with false license plates to be used in the robberies and came along on the robbery trips in case his expertise as a safe-cracker were required.

The evidence showed that on the day in question, Petitioner and five of his associates left from Petitioner's used car lot in Clanton, Alabama for the express purpose of committing two robberies on that day — one in a small town south of Birmingham and the other in Boaz, Alabama at the home of the victims in this case, Mr. and Mrs. Joseph Cherry. Petitioner was along in case his services as a safecracker were required. Petitioner's intelligence information was to the effect that there was supposed to have been a safe in the Cherry residence. Petitioner had earlier attempted to burglarize the Cherry residence to "rob a safe" but had been prevented from doing so because of a burglar alarm system installed in the house. One of Petitioner's accomplices, who testified at the trial stated that "Paul [the Petitioner] came along in case we had to open a safe . . . " and that "he, uh came along and brought the safecracking tools. . . ."

The robbery was successful and some $5,559.00 was taken from Mr. and Mrs. Cherry at gunpoint by two of Petitioner's associates. Following the robbery, Petitioner and his accomplices traveled back to Petitioner's used car lot in Clanton and divided the money and other items taken in the robbery.

A State's witness testified at the trial of a threat that she had received from Petitioner shortly before the trial. Elaine McClellan, wife of one of Petitioner's confederates in the robbery, testified that Petitioner had called her at her home in Dothan, Alabama prior to the trial and had stated, "I don't hurt women or anything, but are you a State's witness?"

All the above evidence, contrary to Petitioner's assertions, was before the trial jury in the case and was not excluded, as Petitioner claims, by the trial court. Each instance where the evidence in question was received and placed before the jury is discussed in more detail below.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE WAS NOT TIMELY FILED.

On May 24, 1977, Petitioner's trial conviction was affirmed by the Court of Criminal Appeals of Alabama, see *Summers v. State*, 348 So. 2d 1126 (Ala. Crim. App. 1977). On June 28, 1977 his application for rehearing in that Court was overruled.

Petitioner thereafter filed a Petition for Certiorari in the Supreme Court of Alabama seeking review by that Court of the decision of the Court of Criminal Appeals upholding his conviction. On August 26, 1977, the Supreme Court of Alabama denied the Petition for Writ of Certiorari, see *Ex Parte Summers*, 348 So. 2d 1136 (Ala. 1977).

On the same day, August 26, 1977, the Court of Criminal Appeals of Alabama entered judgment in the case.

Thereafter, on September 7, 1977 Petitioner's trial counsel filed a motion for stay of judgment to allow him to file a Petition for Writ of Certiorari in the United States Supreme Court in his client's behalf. On that date, September 7, 1977 the Court of Criminal Appeals granted a ninety-day stay of execution of the judgment to run from August 26, 1977 and recalled its certificate of judgment so as to enable Petitioner to file a Petition for Writ of Certiorari in this Court.

United States Supreme Court Rule No. 22(1) requires that all petitions for writ of certiorari to review the judgment of a state court in criminal cases shall be filed in the Supreme Court of the United States within ninety days from entry of judgment by the state court of last resort. In this case the date of such entry of judgment was on August 26, 1977 when the Court of Criminal Appeals rendered final judgment in the case after Petitioner's Petition for Writ of Certiorari in the Alabama Supreme Court was denied.

The ninety-day period set forth in Rule 22 expired on November 24, 1977. On that day or before Petitioner had to have filed his Petition for Writ of Certiorari in this Court to be within the requirements of Rule 22. Instead, he presented his Petition for Writ of Certiorari to this Court on December 29, 1977, some thirty-five days after the expiration of the ninety-day limit set forth in Rule 22. No reason for the delay was stated in the petition.

Respondent is aware that this Court has held that the time requirements of Rule 22 are not jurisdictional and can be relaxed by this Court in the exercise of its discretion when the ends of justice so require, *Schacht v. United States*, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970). However,

Petitioner has presented to this Court no excuse or justification whatsoever for the tardiness of the petition. Petitioner has been represented in all stages of this case by retained counsel and there has been no application to a Justice of the Court to extend the time period for sixty days pursuant to Rule 22(1). Since no reason is shown why this Court should not adhere to the time requirements of Rule 22(1), the petition should be denied.

II. THE TRIAL JUDGE COMMITTED NO ERROR IN REFUSING TO GRANT PETITIONER A CONTINUANCE ON THE DAY OF TRIAL TO OBTAIN THE TESTIMONY OF THE CO-DEFENDANT BY INTERROGATORIES FILED THE DAY BEFORE.

In the trial court below, Petitioner unsuccessfully attempted to use the Alabama statute providing for testimony by interrogatories of absent witnesses for the purpose of delaying his trial. The Alabama statute, Section 12-21-260, *Code of Alabama* 1975, provides that in criminal cases a defendant may secure trial testimony, through the use of written interrogatories, of any witness who is unable to attend court because of age, infirmity or sickness or resides out of state or more than 100 miles from the place of trial. Section 12-21-262, *Code of Alabama* 1975, provides, however, that the procedure cannot be utilized if the witness is present and available to the defendant at trial.

Two weeks prior to trial, utilizing Section 12-21-260, Petitioner filed interrogatories to two indicted co-defendants, Russell Zinkhan, (R. 200) and Donald Nissen, (R. 197). Nissen, who pleaded guilty and received a fifteen year sentence for his role in the robbery, answered the interrogatories

filed by Petitioner (R. 204). He also was present at Petitioner's trial and testified as a witness for the State (R. 38-86, 119-125).

The other co-defendant, Russell Zinkhan, was present in the Marshall County Jail at the Marshall County Courthouse on November 11, 1976, the day of Petitioner's trial, and was thus available to be called as a witness at the trial by Petitioner (R. 8).

One day prior to trial, on November 10, 1976, Petitioner filed a third set of interrogatories purportedly seeking trial testimony from a third indicted co-defendant, Jimmy Thomas (R. 207). Thomas was incarcerated at the time in the State of Florida. The next day, November 11, 1976, the day of trial, Petitioner moved for a continuance on the grounds that his interrogatories had not been answered (R. 210).

A hearing was held on Petitioner's motion for a continuance on the day of trial (R. 7-12). At the hearing, the trial judge pointed out to Petitioner that the co-defendant Zinkhan to whom Petitioner had propounded interrogatories was present on that date in the Marshall County Jail and thus available to Petitioner as a witness (R. 8). Petitioner's counsel stated that he would talk to Zinkhan and issue a subpoena for him (R. 8-9). The availability of Zinkhan as a witness to Petitioner thus mooted any use of the testimony by interrogatory procedure. Section 12-21-262, *Code of Alabama* 1975 precludes the use at trial of such interrogatories if the witness is present and available to the defendant.

In regard to the interrogatories which had been propounded the day before to the co-defendant Thomas, Petitioner made no showing whatsoever at the hearing that Thomas would waive his privilege against self-incrimination

and answer the interrogatories. Furthermore, Petitioner made no showing as to what specific testimony would be provided by the answers to Thomas' interrogatories should they be answered (R. 7-12).

In the face of these facts, it is manifestly clear that the trial judge committed no error whatsoever in denying Petitioner's motion for continuance and that the Alabama Court of Criminal Appeals was entirely correct in affirming the trial judge's action in denying the motion for a continuance. It is clear that the granting or denial of a continuance is a matter withi the sound discretion of the trial judge, *Ungar v. Sarafite*, 376 U.S. 575, 11 L. Ed. 2d 921, 84 S. Ct. 841 (1964); *Avery v. Alabama*, 308 U.S. 444, 84 L. Ed. 377, 60 S. Ct. 321 (1940); *Franklin v. South Carolina*, 218 U.S. 161, 54 L. Ed. 980, 30 S. Ct. 640 (1910). Under the facts and circumstances in this case no abuse of discretion was committed by the trial judge. The law is well settled that before any question of error can be presented concerning a refusal of a trial court to grant a continuance to secure the testimony of absent witnesses, there must have been a showing at the time of what the absent witness would testify to, that the testimony in question could in fact be obtained and that the evidence sought would be substantially favorable to the accused, see e.g., *United States v. Harris*, 436 F. 2d. 775 (9th Cir. 1970); *United States v. Roca-Alverez*, 451 F. 2d 843 (5th Cir. 1971) reh. granted on other grounds 474 F. 2d 1274 (1972); *Blackwell v. United States*, 405 F. 2d 625 (5th Cir. 1969), cert. den. 395 U.S. 962 (1969). See also *Dearinger v. United States*, 468 F. 2d 1032 (9th Cir. 1972); *Leino v. United States*, 338 F. 2d 154 (10th Cir. 1964); *Sanchez v. United States*, 311 F. 2d 327 (9th Cir. 1962) cert. den. 373 U.S. 949 (1963); *Suit v. Ellis*, 282 F. 2d 145 (5th Cir. 1960). The Supreme Court of the United States in *Ungar v. Sarafite*, 376 U.S. 575,

11 L. Ed. 2d 921, 84 S. Ct. 841 (1964) has clearly recognized the rule that before a due process claim can be made out in cases involving a denial of a motion for a continuance, the accused must have made a good and sufficient showing *at the time* of the underlying reasons behind the necessity for a continuance:

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (citations omitted). 376 U.S. at 589, 11 L. Ed. 2d at 931.

Here, the facts manifestly show that no error is present. Petitioner propounded interrogatories seeking trial testimony to three persons. One of the three answered the interrogatories and testified at the trial. The second was available at the trial to be called by a witness by Petitioner. Interrogatories to the third person were not filed until the day prior to trial. These interrogatories were sent to a person under indictment for the same crime as Petitioner. Petitioner made no showing either that his co-defendant would answer the interrogatories or of what specific testimony the co-defendant would provide should he answer the interrogatories. Under this set of circumstances, Petitioner may in nowise claim a denial of due process.

III. THE COURT OF CRIMINAL APPEALS OF ALABAMA WAS CORRECT IN HOLDING NO ERROR WAS PRESENT IN A PROSECUTOR'S REFERENCE TO PETITIONER AS A "SAFE SPECIALIST" IN CLOSING SUMMA-

TION AS SUCH REFERENCE WAS PROPERLY BASED UPON COMPETENT EVIDENCE BEFORE THE JURY IN THE TRIAL BELOW.

Petitioner complains that the Court of Criminal Appeals of Alabama denied him due process when it found no error in a reference by the prosecuting attorney to Petitioner as a "safe specialist" during the prosecutor's closing argument at the trial below. Specifically, Petitioner complains that the Court of Criminal Appeals of Alabama was in error in so holding because the remarks by the prosecuting attorney were not based upon evidence before the jury. He claims that the Court of Appeals relied upon evidence which had been excluded from the jury's consideration in affirming the propriety of the prosecutor's remarks.

Yet, when the trial record below is examined, it is quite evident that such is not the case at all. The remarks of the prosecuting attorney were fully based upon evidence which was squarely before the jury for its consideration.

For example, during the testimony of Donald Nissen, an accomplice of Petitioner who testified against Petitioner at the trial, there was testimony which clearly pointed to Petitioner's specialty as a safecracker. Nissen testified that prior to the robbery in question, Petitioner had related to his group of accomplices a prior occasion wherein he and some other persons had "cased" the residence of the victims in the case. Nissen testified as to what Petitioner had told them:

> It was discussed about robbing the Cherry family. Paul Summers told us that, uh, he had, uh, been up

> there and looked at it with the intentions of burglarizing the house, *to rob a safe*, with someone else. I'm not sure who the other person was. Due to the fact that there was an alarm on the house, uh, a burglar alarm, they could not break in without detection, so that he had asked us to go up there and look at it with him with the thought in mind of robbing the family at gunpoint because they couldn't get in to pull a burglary. (R. 41) (Emphasis supplied)

Later on in his testimony, Nissen testified that:

Q. Don, what did Mr. Summers, the defendant, or anybody in his presence say about his coming on that trip that day?

A. *Paul came along in case we had to open a safe, to open the safe for us at the first place that we robbed that day.*

Q. All right. Where was that?

MR. WILKINSON: We object, Your Honor.

THE COURT: Overruled.

MR. WILKERSON: We except.

Mr. Yung (Continued):

Q. Where was that?

A. That was, uh, a home near Hoover of a, uh, policeman. I don't remember his name offhand,

and we did rob the place but *there was no safe inside the house.*

Q. All right. And what, if anything, did he say he would do had there been a safe there?

MR. WILKERSON: We object. T his is something a hundred miles away and totally unrelated.

MR. YUNG: Your Honor, it's all part of the same criminal adventure.

MR. WILKERSON: We object.

THE COURT: Overruled. Go ahead.

MR. WILKERSON: We except.

A. *He, uh, came along and brought the safecracking tools,* uh, and was ready to open the safe at that house when we were in there.

MR. WILKERSON: I object and move to exclude that.

Mr. Yung (Continued):

A. Was there a safe in that house?

THE COURT: Just one second. Let me rule on this.

MR. YUNG: Excuse me.

THE COURT: The words of the witness that he was ready to do certain things are ex-

cluded as being a conclusion of the witness; do not consider them in reaching your decision in this case.

Mr. Yung (Continued):

Q. Was there a safe in the first house?

MR. WILKERSON: We object.

THE COURT: I believe he has already answered that question. Sustained.

MR. YUNG: I believe that's all.
(R. 84-85) (Emphasis supplied)

Therefore evidence was clearly before the jury that (1) Petitioner had earlier "cased" the scene of the crime with the intention of burglarizing it to "rob a safe"; (2) Petitioner came along on the journey to "open the safe" in the first of two robberies committed that day and (3) Petitioner had "brought the safe-cracking tools" with him on the trip. The only evidence that was excluded by the trial court during this portion of the testimony was a conclusion on the part of the witness Nissen as to what Petitioner was "ready to do" at the scene of one of the robberies.

Therefore, the reference by the prosecuting attorney to Petitioner as a "safe specialist" was clearly supported by the evidence adduced at the trial. Under the evidence in the case, the statement succinctly and accurately described one of Petitioner's roles in the robbery for which he was convicted.

Further, in addition to the fact that the reference was completely supported by the evidence, the Court of Criminal

Appeals of Alabama was entirely correct in holding that the reference did not constitute error. A review of the applicable law shows the reference to be well within the scope of permissible comment that may be utilized by a state court prosecuting attorney in closing arguments in state criminal trials.

There is a distinction between the types of review that will be exercised by this Court in examining statements made in final summation in state court proceedings and the review which will be exercised in regard to federal court proceedings. In *Donnelly v. DeChristoforo*, 416 U.S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974) this Court made it clear that in cases involving the propriety and prejudicial effect of a prosecutor's courtroom statements, the standard of review that will be employed in examining state proceedings is the narrow ground of determining whether due process has been violated. This was contrasted with the broader and stricter review applicable to federal criminal prosecutions under the supervisory power exercised by federal appellate courts over federal trial courts. In *Donnelly*, this Court stated:

> The Court of Appeals in this case noted, as petitioner urged, that its review was "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 US 219, 236, 86 L. Ed. 166, 62 S. Ct. 280 (1941). . . . 416 U.S. at 642, 40 L. Ed. 2d at 436.

However, in this case, regardless of what standard of review is employed, no error is shown. The argument by the prosecuting attorney here, which was completely supported by the record, not only does not constitute error of either kind, but constitutes completely proper argument by an advocate for the Government in a criminal trial.

In reviewing the propriety of the closing arguments made by a prosecutor in a criminal case, federal appellate courts recognize the same rule cited by the Alabama Court of Criminal Appeals in its opinion below, i.e., that prosecuting attorneys are allowed wide latitude in drawing their deductions from the evidence and that comments, even though hard-hitting, which may arise from reasonable inferences from the evidence are permissible, see e.g., *United States v. Nolan*, 551 F. 2d 266 (10th Cir. 1977); *United States v. Deloach*, 504 F. 2d 185, 164 U.S. App. D.C. 116 (1974); *United States v. Gorostiza*, 468 F. 2d 915 (9th Cir. 1972); *United States v. Lawson*, 483 F. 2d 535 (8th Cir. 1973) cert. den. 414 U.S. 1133 (1974). In *United States v. Cook*, 432 F. 2d 1093 (7th Cir. 1970) cert. den. 401 U.S. 996 (1971) the Seventh Circuit stated the rule to be:

> The district attorney is quite as free to comment legitimately and speak fully, although harshly, upon the action and conduct of the accused, if the evidence supports his comments, as is the accused's counsel to comment upon the nature of the evidence and the character of the witnesses which the government produces and which is favorable to him. 432 F. 2d at 1106-07.

An examination of other cases which have involved characterization of the defendant by a prosecuting attorney

show that the reference by the prosecutor in this case to the defendant as a "safe specialist" in the context of this case, clearly does not constitute error. Such a statement is well within not only the bounds established by the narrow due process standard employed in reviewing state court proceedings, but also well within the broader and stricter standards used in reviewing federal criminal trial proceedings.

Such a statement is clearly not a denial of due process. For example, in *Downie v. Burke*, 408 F. 2d 343 (7th Cir. 1969) cert. den. 395 U.S. 940 (1969), a state prisoner alleged that the prosecuting attorney referred to him in his final summation to the jury as a "Big Ape" and a "Gorilla." It was claimed that such argument was so improper as to constitute both a denial of due process and a denial of the right to trial by an impartial jury. The Seventh Circuit disagreed, holding that the claimed references by the prosecutor did not constitute any such error as would "attain constitutional proportions," 408 F. 2d at 344. Likewise, in *Kelley v. Rose*, 346 F. Supp. 83 (E.D. Tenn. 1972) a state prisoner contended in a habeas corpus petition that in a rape prosecution, the prosecuting attorney in closing argument, referred in part to him stated: "These things, these animals, these beasts, brutally attacked this little twelve-year old girl." It was claimed that this asserted argument was improper and its error reached constitutional proportions resulting in a denial of due process. The Court, assuming the closing argument to be as asserted by the habeas corpus petitioner, held that such argument, even though it might have been improper, "would not appear to rise to the level of the denial of due process," 346 F. Supp. at 89.

The prosecuting attorney's reference to Petitioner as a "safe specialist" in this case, as such a reference was completely supported by the evidence, is also well within the stricter standard employed by federal appellate courts in judging the propriety of closing arguments made in federal criminal trial proceedings. For example, in *United States v. Cook*, supra, the prosecutor in closing summation referred to Cook as a "sub-human man" with a "rancid, rotten mind," and a "true monster." The evidence showed in the case that the defendant had engaged in a plot to kill his wife by having a bomb explode on an airplane in which she was traveling, a crime which, if successful, would have resulted in the deaths of some eighty other persons. The Seventh Circuit rejected the defendant's contentions that the above argument constituted reversible error stating that "There would seem to be evidence supporting the comments of the prosecuting attorney," 432 F. 2d at 1107. Further, in *United States v. Taxe*, 540 F. 2d 961 (9th Cir. 1976) cert. den. 97 S. Ct. 737 (1977), the prosecutor referred to the defendant in closing argument as a "fraud", "scavenger", "parasite", and "professional con-man", in a prosecution for record piracy. The Ninth Circuit held that the characterizations in question were either supported by the evidence or not enough of an exaggeration to have deprived the defendant of a fair trial, 540 F. 2d at 968.

In *United States v. James*, 466 F. 2d 475, 151 U.S. App. D.C. 304 (1972) in a federal criminal trial in the District of Columbia, the prosecuting attorney used the term "monster." The Court of Appeals for the D. C. Circuit held that, in the context in which the comment was made, that there was no impropriety. In *United States v. Guidarelli*, 318 F. 2d 523 (2nd Cir. 1963), cert. den. 375 U.S. 828, in a prosecution for filing false and fraudulent income tax returns, the prosecutor referred to the defendant as a "leech" in final summation.

The Second Circuit held that this reference by the prosecutor to the defendant was not sufficient to require a reversal of the case. Other circuits have allowed equally wide latitude in determining the propriety of the statements made by a federal prosecuting attorney in closing argument in federal criminal proceedings. Among the sobriquets which have been upheld as proper or not sufficiently prejudicial to require reversal have been "panderer," *Patterson v. United States*, 361 F. 2d 632 (8th Cir. 1966); "human vulture," *Kowalchuk v. United States*, 176 F. 2d 873 (6th Cir. 1949); "pimp," *United States v. Cohen*, 177 F. 2d 523 (2nd Cir. 1949), cert. den. 339 U.S. 914 (1950); "king of bootleggers," *Lau v. United States*, 13 F. 2d 975 (8th Cir. 1926), cert. den. 273 U.S. 739 (1927); "burglar," *United States v. Stead*, 422 F. 2d 183 (8th Cir. 1970), cert. den. 397 U.S. 1080 (1970); "trafficker in human misery," *United States v. Markham*, 191 F. 2d 936 (7th Cir. 1951); "crook," *United States v. Hoffman*, 415 F. 2d 14 (7th Cir. 1969), cert. den 396 U.S. 958 (1969); "natural son of an unnatural father," *United States v. Walker*, 190 F. 2d 481 (2nd Cir. 1951), cert. den. 342 U.S. 868 (1951); "wolf from Wall Street," *United States v. Goodman*, 110 F. 2d 390 (7th Cir. 1940); "living fraud," *Herman v. United States*, 220 F. 2d 219 (4th Cir. 1955), cert. den. 350 U.S. 971 (1956); and "partner in crime," *Mellor v. United States*, 160 F. 2d 757 (8th Cir. 1947), cert den. 331 U.S. 848 (1947).

Petitioner's citation of *Hall v. United States*, 419 F. 2d 582 (5th Cir. 1969) is completely inapposite to the case at bar. In *Hall*, the Fifth Circuit specifically pointed out that the reference to the defendant as a "hoodlum" was *unsupported by the evidence*, 419 F. 2d at 587. Here, as stated at length above, the reference by the prosecuting attorney to the Petitioner as a "safe specialist" was completely

supported by the evidence and accurately and succinctly described Petitioner's role in the robbery for which he was convicted.

IV THE COURT OF CRIMINAL APPEALS WAS CORRECT IN HOLDING THAT NO ERROR WAS PRESENTED BY THE PROSECUTING ATTORNEY'S REFERENCE TO A THREAT MADE BY PETITIONER TO A STATE'S WITNESS PRIOR TO THE TRIAL AS SUCH REFERENCE WAS SUPPORTED BY COMPETENT EVIDENCE WHICH WAS BEFORE THE JURY IN THE TRIAL BELOW.

Petitioner further asserts that the Court of Criminal Appeals denied him due process when it held that a reference made by the prosecuting attorney in closing summation to a threat made by Petitioner to a State's witness was proper. Petitioner again asserts that the Court of Criminal Appeals relied upon evidence which had been excluded by the trial court in upholding the prosecutor's remarks.

Yet, again, an examination of the record shows that such is not the case. The threat to which the prosecuting attorney made reference in his closing summation was clearly and properly before the jury.

During the testimony of Elaine Campbell McClellan, the wife of one of Petitioner's confederates in the robbery, the threat made by defendant was squarely placed in evidence before the jury. Mrs. McClellan testified to the following:

> Q. Elaine, have you had occasion to speak with the defendant in the last few weeks?

A. Yes, I have.

Q. Where were you at the time?

A. At home.

Q. All right. Did you speak with the defendant in person or on the telephone?

A. Over the phone again.

Q. Did you call him or did he call you?

A. He called me.

Q. Would you tell the Jury what, if anything, he said at that time?

A. First of all, he said would I answer a question truthfully for him.

Q. What did you tell him?

A. I said yes I would.

Q. What did he say in response to that, if anything?

A. He wanted to know if I was going to be a State's witness.

Q. What did you tell him?

A. I said, "Lord, no, whatever gave you that idea?"

Q. Did he say anything else?

Q. Yes. Before he asked me the question . . .

THE COURT: Speak a little louder, please.

Mr. Royer (Continued):

Q. Did he say anything else at that time when he asked you if you were going to be a witness?

MR. WILKERSON: We object to this whole line of inquiry.

THE COURT: Overruled at this point.

Mr. Royer (Continued):

Q. You may answer.

A. Yes. Before he asked me the question if I was going to be a State's witness, he said, "I don't hurt women or anything, but are you a State's witness?"

Q. The defendant asked you that?

A. Yes, he did.

Q. On the telephone?

A. Right.

MR. ROYER: Your witness.

(R. 96-97).

The implication as recognized by the Alabama Court of Criminal Appeals, was clear — it was a "warning to Mrs. McClellan that she would be in danger if she showed up at

appellant's trial and testified against him," 348 So. 2d at 1135.

The reference made in final summation by the prosecutor to this threat by Petitioner to Mrs. McClellan had been provoked and invited by similar remarks made by Petitioner's counsel during his portion of the closing argument. Petitioner's counsel had complained that Petitioner did not know ahead of time who the witnesses were who would testify against him at the trial. Petitioner's counsel had stated:

> You look at the indictment and see who is listed as witnesses on that indictment. Mr. and Mrs. Joe Cherry. The Cherrys. That's all. That's all Paul Summers knew, that he was charged with robbing the Cherrys, not on a specific date, not until he comes into this courthouse does he know. (R. 142-43).

It was in response to the above statements by Petitioner's counsel that the prosecuting attorney made the statements regarding the threat by Petitioner to Mrs. McClellan. That portion of the argument of the prosecuting attorney which contains the reference is as follows:

> He [Petitioner's counsel] complained that Paul Summers didn't know who the witnesses were going to be from the indictment because the indictment only listed the Cherrys. Lady and Gentlemen, if he had known who the witnesses were going to be, there is some evidence that would suggest that we would not have had any witnesses. Elaine McClellan testified that . . .
>
> MR. WILKERSON: Your Honor, we object, if it please the Court.

> THE COURT: Let me think just a second. I believe he can answer that. Overruled [sic] your objection.
>
> MR. WILKERSON: He's arguing as to suggest some alleged threat to kill a witness, I think.
>
> MR. YUNG: Judge, I haven't said anything about any . . .
>
> THE COURT: I don't know what he is going to say.
>
> MR. YUNG: Elaine, you will recall, said that just a few weeks ago she got a threatening phone call of recent date from this man who said, "Elaine, I don't hurt women or anything, but" or words to that effect, "You wouldn't be a State's witness in the case that's coming up against me, would you?" and she said, "No, why would you think that, Paul?" and, well, apparently he believed her. She did show up today.
>
> MR. WILKERSON: Judge, we object to that. We ask the Court to instruct the jury to disregard that. It's prejudicial and inflammatory.
>
> THE COURT: Disregard the last statement of counsel; don't consider it in reaching your decision in this case. (R. 153-54).

Under the facts as shown by the record in this case, the Alabama Court of Criminal Appeals was quite correct in holding that there was no error in the prosecutor's statements. Reference to the threat made by Petitioner to the State's witness, Elaine McClellan, was clearly supported by

the record in the case. As such, this conduct by Petitioner in evidence, was clearly a matter of proper comment by the prosecutor. The argument by the prosecutor was merely in response to and answered the statement made by Petitioner's attorney during his portion of summation. Finally, when the prosecuting attorney made specific reference to the statement in question, the trial judge, upon Petitioner's request, instructed the jury to disregard the statement made by the prosecutor.

It is axiomatic that a prosecutor, in closing argument, may make fair comment upon and respond to matters raised by defense counsel during his portion of the final summation, see, e.g., *United States v. Isaacs*, 493 F. 2d 1124 (7th Cir. 1974) cert. den. *Kerner v. United States*, 417 U.S. 976 (1974); *United States v. Martin*, 533 F. 2d 268 (5th Cir. 1976); *United States v. Marquez*, 462 F. 2d 893 (2nd Cir. 1972); *United States v. Passero*, 290 F. 2d 238 (2nd Cir. 1961) cert. den. 368 U.S. 819 (1961); *United States v. Harris*, 494 F. 2d 1273 (10th Cir. 1974) cert. den. 419 U.S. 993 (1974); *United States v. Librach*, 536 F. 2d 1228 (8th Cir. 1976). It is said that a prosecuting attorney has considerable latitude in replying to his opponent's arguments, see *United States v. Nolan*, 551 F. 2d 266 (10th Cir. 1977); *United States v. Nowak*, 448 F. 2d 134 (7th Cir. 1971) cert. den. 404 U.S. 1039 (1972); *United States v. Lawler*, 413 F. 2d 622 (7th Cir. 1969), cert. den. 396 U.S. 1046 (1970). In this context, the remarks of the prosecuting attorney in reply to Petitioner's counsel's arguments were entirely proper. Petitioner's counsel complained that his client was not informed prior to the trial who the witnesses were who were going to testify against him. The prosecuting attorney, replying in kind, used the defendant's own conduct, statements and actions which were in evidence to explain the reason why.

Furthermore, when the prosecutor quoted the specific testimony involving the threat made by Petitioner in closing argument, upon Petitioner's objection, the trial court instructed the jury to disregard the statement in reaching their verdict in the case. Clearly then, if any error whatsoever was present in the prosecutor's remarks, the action of the trial judge in instructing the jury to disregard the statement cured the error.

CONCLUSION

In short, none of the rulings here complained of constitute error, much less error of constitutional proportions. For Petitioner to be successful on this writ he must establish that the rulings below were error of sufficient magnitude to result in a denial of due process. Under the evidence in the record of this case he can make no such showing and Respondent submits the writ is due to be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL

BY—

GEORGE W. ROYER, JR.
ASSISTANT ATTORNEY GENERAL

250 Adminisrative Building
Montgomery, Alabama 36130

AFFIDAVIT OF SERVICE

I, George W. Royer, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in this case were mailed on this date to the Honorable Fred Blanton, attorney for Petitioner, at his address at 3716 5th Avenue South, Birmingham, Alabama 35222, first class, postage prepaid.

Dated this the 25 day of January, 1978.

Geo. W. Royer

GEORGE W. ROYER, JR.
ASSISTANT ATTORNEY GENERAL

250 Administrative Building
Montgomery, Alabama 36130

APPENDIX

Section 12-21-260, **Code of Alabama, 1975**

(a) The defendant may take the deposition of any witness who from age, infirmity or sickness, is unable to attend court or who resides out of the state or more than 100 miles from the place of trial, computing by the route usually traveled, or who is absent from the state or where the defense, or a material part thereof, depends exclusively on the testimony of the witness.

(b) When the defendant desires to take the deposition of any witness under the provisions of subsection (a) of this section, he must make affidavit before some officer authorized to administer oaths, setting forth some one or more of the above causes for taking the deposition and that the testimony of the witness is material and must file with the clerk interrogatories to be propounded to the witness, a copy of which interrogatories must be served on the prosecutor or on the district attorney, if either of them is in the county. Such prosecutor or district attorney may, within 10 days thereafter, file cross-interrogatories, to which the defendant may, within a like period of 10 days, file rebutting interrogatories, at the expiration of which time or, if no cross-interrogatories are filed, at the expiration of 10 days from the filing of the interrogatories in chief, the clerk must issue a commission, accompanied with a copy of all the interrogatories filed, and the deposition must be taken at such time and place as the commissioner may appoint. If neither the district attorney nor prosecutor is in the county, service of the interrogatories may be had by filing the interrogatories in the office of the clerk for 10 days.

Section 12-21-262, **Code of Alabama, 1975**

Deposition taken under the provisions of sections 12-21-260 and 12-21-261 are governed by the same rules which are

applicable to depositions taken in civil cases, and no such deposition can be read in evidence on the trial if it appears that the witness is alive and able to attend court and within its jurisdiction.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

8 Div. 943

Oliver Paul Summers, alias

v.

State

Appeal from Marshall Circuit Court

Number 76-250A

November 12, 1976 Notice of Appeal Filed.

January 12, 1977 Record Filed.

January 12, 1977 Notice of Filing Record to all Parties.

April 5, 1977 Come the parties by attorneys and argue and submit this cause for decision.

May 24, 1977 Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this Court and of the Circuit Court.

June 7, 1977 Comes the appellant in the above styled cause and moves the Court to grant a rehearing.

June 28, 1977 It is ordered that the application for rehearing is overruled.

July 12, 1977 Petition for Writ of Certiorari filed in the Alabama Supreme Court.

August 26, 1977 Petition for Writ of Certiorari denied by the Alabama Supreme Court.

August 26, 1977 Certificate of Judgment of Court of Criminal Appeals issued.

September 7, 1977 Motion for Stay of Judgment filed by appellant.

September 7, 1977 Motion granted and stay of ninety days from August 26, 1977 allowed for filing petition for Writ of Certiorari in the Unied States Supreme Court.

September 7, 1977 Certificate of Judgment of Court of Criminal Appeals recalled from Circuit Court of Marshall County.

STATE OF ALABAMA)
)
MONTGOMERY County)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the foregoing page contains a full, true and correct copy of the docket entries, orders, and judgment in the appeal of Oliver Paul Summers, alias v. State of Alabama, 8 Div. 943, Marshall Circuit Court Number 76-250A, as the same remain of record and on file in this office.

WITNESS, Mollie Jordan, Clerk
of the Court of Criminal Appeals,
this 8th day of December, 1977.

MOLLIE JORDAN
Clerk, Court of Criminal Appeals of
Alabama